

CHURCHES AND COPYRIGHT LAW

THE PITFALLS OF CREATING IN ANOTHER'S IMAGE

Davis Wright Tremaine LLP



ATTENTION

- **THIS EVENT IS BEING VIDEOTAPED. BY ENTERING YOU CONSENT TO THE EXHIBITION OF YOUR NAME, VOICE, AND LIKENESS.**

COPYRIGHT BASICS

What Is A Copyright?

- **“Copyright” protection subsists ... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. 17 USC § 102(a).**

HUH?

“Copyright” is the legal right to use creative works in a variety of ways.

■ CREATIVE WORKS

- Literary Works
- Musical Works
- Dramatic Works
- Pantomimes and Choreographic Works
- Pictorial, Graphic, and Sculptural Works
- Motion Pictures and Other Audio Visual Works
- Sound Recordings
- Architectural Works

■ RIGHTS PROTECTED

- To reproduce the work in copies or phonorecords
- To prepare derivative works
- To distribute copies or phonorecords to the public by sale or other transfer of ownership, or by rental, lease, or lending
- To perform the work publicly
- To display the work publicly
- To perform the work publicly by means of a digital audio transmission

What Works Are We Addressing Today?

- **Musical Works**
- **Audiovisual Works**

MUSICAL WORKS



What Is A Musical Work?

- **The Copyright Act does not specifically define “musical works” because the term has a fairly settled meaning.**
- **A musical work is a “song,” and copyright law protects both the instrumental component of the work and any accompanying words.**

COMPONENTS OF A MUSICAL WORK

- **Sound Recording**: The Copyright Act defines sound recordings as “works that result from the fixation of a series of musical, spoken or other sounds, ... regardless of the nature of the material objects, such as disks, tapes, or other **phonorecords**, in which they are embodied.” 17 USC § 101.
- **Musical Composition**: The Copyright Act does not define “musical composition,” but the term commonly is understood to refer to the tune (melody, harmony, rhythm) and the words of a musical work.

What does it mean for a work to be “fixed?”

- The definitions of “sound recording” and “phonorecord” use the word “fixed.”
- A work is “fixed” if it is embodied in a copy or phonorecord, and it is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

Help me distinguish a musical composition from a sound recording

- **Example 1 – If your favorite band went into the studio and recorded “Amazing Grace,” the melody, harmony, rhythm and words of the musical work would make up the musical composition, and the master tape recording would be the sound recording.**
- **Example 2 – Your favorite band records “Amazing Grace.” The lyricist or composer would be the author of the musical composition, and the band or record producer who processed the sounds and fixed them on the master tape would be the author of the sound recording.**

Pop Quiz

- Name the six exclusive rights that the copyright law protects.
- Hint: They are listed in Section 106 of the Copyright Act.

The Six Exclusive Rights Are:

- The right to reproduce the work in **copies** or **phonorecords**;
- The right to prepare **derivative works** based upon the work;
- The right to distribute copies or **phonorecords** of the work to the public by sale, lease, loan or rent;
- The right to **perform** the work **publicly**;
- The right to **display** the work **publicly**; and
- The right to perform the work publicly by means of a **digital audio transmission**.

“Copies”

- **“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 USC § 101.**

“Phonorecords”

- **“Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 USC § 101.**

“Derivative Works”

- A “derivative work” “is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 USC § 101.

“Perform”

- **“To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 17 USC § 101.**

“Display”

- **“To ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.” 17 USC § 101.**

“Publicly”

- To perform or display a work “publicly” means –
- “To perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered”; or

“Publicly” contd.

- **To transmit or otherwise communicate a performance or display the work to a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. 17 USC § 101.**

“Digital Transmission”

- “A ‘digital transmission’ is a transmission in whole or in part in a digital or other non-analog format.” 17 USC § 101.

Which of these six exclusive rights apply to musical works?

It depends ...

■ Musical Composition

- Right of reproduction;
- Right to prepare derivative works;
- Right to distribute copies or phonorecords to the public;
- Right of public performance; and
- Right of public display.

■ Sound Recording

- Right of reproduction;
- Right to prepare derivative works;
- Right to distribute phonorecords to the public; and
- Digital performance right.

Some performances may help illustrate these points.

- During these performances ask yourself these questions:

QUESTIONS:

1. Did the performance here amount to a “public performance” as defined in the Copyright Act?
2. Can I distinguish the musical composition from the sound recording in each performance?
3. Do I understand which of the exclusive rights are implicated in each performance?
4. How can I determine who owns the copyright in the sound recordings and musical compositions?
5. **Why do I care?**

CROSSROADS STEPS OF PRAISE

- **Did this performance involve a musical work?**
- **Did it involve both components of a musical work?**
- **Whose permission, if any, would I need to use this work?**
- **Which of the exclusive rights were implicated by this performance?**

“Called”

- **Did this performance involve a musical work?**
- **Did it involve both components of a musical work?**
- **Whose permission, if any, would I need to use this work?**
- **Which of the exclusive rights were implicated by this performance?**

The Maywood Praise Band

- **Did this performance involve a musical work?**
- **Did it involve both components of a musical work?**
- **Whose permission, if any, would I need to use this work?**
- **Which of the exclusive rights were implicated by this performance?**

WHY DO I CARE ABOUT THIS STUFF?

- **Because it is expensive not to...**

COPYRIGHT INFRINGEMENT

What is a copyright “infringer?”

- A person or entity that violates one of the copyright owner’s exclusive rights, including the rights set forth in Section 106:
 1. Reproduction;
 2. Preparation of derivative works;
 3. Public distribution;
 4. Public performance;
 5. Public display; and
 6. Public digital performance.

How do I “violate” the copyright owner’s exclusive rights?

- By reproducing, derivating, publicly distributing, publicly performing (including digital performances of sound recordings), or publicly displaying a copyrighted work without the copyright owner’s express permission.

What do I risk by using a work without the owner's permission?

- Quite a bit ...

REMEDIES

- **NON-MONETARY:**
 1. **Injunctions – an order from the court directing you to stop infringing.**
 2. **Impoundment and Disposition – an order from the court to impound and destroy (or otherwise dispose of) the infringing materials.**

REMEDIES

- **MONETARY:**

Actual Damages and Profits: An order from the court allowing the copyright owner to recover from you the actual damages he/she/it suffered as a result of the infringement, plus any of the profits you may have made from your infringing activity.

REMEDIES

- **MONETARY:**

Statutory Damages – court **must award between \$750.00 and \$30,000.00 at its sole discretion for **each work infringed**. This maximum can be increased to \$150,000.00 if the plaintiff proves that the infringement was **willful**.**

REMEDIES

- **ATTORNEYS' FEES AND COSTS:**

The prevailing party in an infringement action may recover reasonable costs and attorneys' fees at the court's discretion.

A Note About Copyright Registration...

- In order for a copyright owner to recover statutory damages and attorneys' fees, he/she/it must have registered the work with the Copyright Office.
- Registration is not a prerequisite to the recovery of costs.

**BUT, NO ONE WOULD DARE
SUE A CHURCH, RIGHT?**

**We're doing God's work, so why
didn't Congress cut us a break?**

Congress was not completely unsympathetic to Churches...

- Congress did enact a “Worship Services” exemption that permits certain uses of copyrighted works without the copyright owner’s permission.

WORSHIP SERVICES EXEMPTION

- **The following use of a copyrighted work is not an infringement: performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly. 17 USC § 110(3).**

WORSHIP SERVICE EXEMPTION CONTD.

- **The Worship Service exemption implicates two of the six exclusive rights: right of public performance and the right of public display.**

Public Display During Worship

- **Section 110(3) provides a complete exemption for the right of public display, as long as the display occurs “in the course of services” and “at a place of worship or other religious assembly.”**

Public Performance During Worship

- **Section 110(3) permits the public performance only of “nondramatic” literary or musical works” or of “dramatico-musical works of a religious nature,” but only “in the course of services” and “at a place of worship or other religious assembly.”**

What is a dramatic work?

- A work intended as a dramatization, including screenplays, plays, choreography, radio and television scripts, pantomimes, and film treatments.

**THE NATURE OF WORSHIP MAKES
INFRINGEMENT REPRODUCTIONS AND
DERIVATIONS VERY LIKELY.**

Artistic expressions cannot be paraphrased without losing some of their unique content...

- “In many cases, houses of Worship cannot truly start a dialogue about a work’s message unless they show the artwork in its original medium – e.g., playing a movie clip rather than describing it or acting it out on stage, or displaying a sculpture rather than a picture of it.” Wassom, Brian, “Unforced Rhythms of Grace: Freeing Houses of Worship from the Specter of Copyright Infringement Liability,” Fordham Intell. Prop. Media & Ent. L.J., at 170 (Feb. 1, 2006).

Lyrics and displays must often be reproduced in order to be useful in Worship...

- **None of the exemptions in Section 110 provide an even arguable basis for making copies of copyright works, like song lyrics. This reproduction is infringing (whether the lyrics are reproduced in paper copies or projected onto a screen), unless you have the owner's permission.**

Many uses of musical, choreographic and audiovisual works in Worship are likely to create a derivative work.

- **Musical directors and other talent usually deviate from the exact notes and lyrics. This type of “spirit led” Worship often infringes the owner’s exclusive right to create derivative works.**

Here's the bad news...

- **Currently, there is no guaranteed mechanism that Churches can rely on to ensure that their uses of copyrighted works are unquestionably lawful.**

So why bother incorporating artistic works in Worship?

The 8 Wassom Factors

- **“The arts help busy and distracted congregants to focus. Congregants will not hear any message communicated in a Worship Service if their hearts and minds are not prepared to receive it.”**
- **“Popular works can help Churches overcome barriers of distrust. For those entering a worship service not only distracted but also skeptical of religious perspectives or institutions, the arts can communicate messages to the heart that the mind is unwilling to consider.”**

The 8 Wassom Factors contd.

- **“Using familiar popular works as a springboard into unfamiliar concepts is a time-honored teaching method. Using examples from the common culture connects the familiar with the unfamiliar – and biblical mores are increasingly unfamiliar in contemporary society.”**

The 8 Wassom Factors contd.

- **“Arts in Worship spark the imagination and allow an experience of the transcendent. ... No other art form sparks imagination in a Worship Service quite as directly as dramatic storytelling – whether through live performance or on the projector screen.”**

The 8 Wassom Factors contd.

- **“Worship arts can minister to wounded emotions. ... Few demographic groups in a congregation are likely to be wrestling with emotions more often or intensely than adolescents. Movie clips and popular music can be especially useful for addressing those needs and engaging teens in Worship.”**

The 8 Wassom Factors contd.

- **“Worship arts foster stronger community ties within the congregation. Arts not only draw people into Houses of Worship, but they also help to anchor attendees within the community.”**

The 8 Wassom Factors contd.

- **“Using popular artworks in Worship teaches congregants to be more critical consumers of popular media. [H]ouses of Worship incorporate popular artworks into their services in order to begin a dialogue with popular culture ... But a necessary prerequisite to this comparison is the ability to recognize the message being communicated by the work, both through its form and its content. Featuring popular artworks in the course of a Worship Service isolates and exposes the message contained in the work, allowing congregants to evaluate it.”**

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The 8 Wassom Factors Contd.

- **“Arts present new perspectives and new understanding. Artistic expression in Worship can also do more than soothe our emotions and spark our imaginations. Sometimes it confronts us and forces us to reconcile with the uncomfortable.”**

**Okay, you've made the case for continuing
to use artistic works during Worship,
despite the risk.**

How can we minimize our exposure to infringement litigation?

- FAIR USE
- BLANKET LICENSING

AUDIOVISUAL WORKS

THE FAIR USE DOCTRINE

BLANKET LICENSING

- **Christian Copyright Licensing International (“CCLI”) – www.ccli.com;**
- **Church Video Licensing International – www.cvli.com;**
- **California-Pacific Annual Conference Media Center - <http://www.cal-pac.org/com>.**
- **Christian Copyright Solutions – www.copyrightsolver.com.**

THE MOST IMPORTANT RESOURCE

- **The United States Copyright Office –**
www.copyright.gov.

If you have any questions

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THANK YOU FOR ATTENDING

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